No. 95-1608

IN THE
Supreme Court Of The United States
October Term, 1995

LOU MCKENNA, Director, Ramsey County Department of Property Records and Review, and JOAN ANDERSON GROWE, Secretary of State, State of Minnesota,

Petitioners,

v.

TWIN CITIES AREA NEW PARTY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE CONSERVATIVE PARTY OF NEW YORK AND LIBERAL PARTY OF NEW YORK AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE

The Conservative Party of New York State ("Conservative Party") and the Liberal Party of New York State ("Liberal Party") submit this brief in support of Respondent Twin Cities Area New Party ("New Party") and the decision of the Court of Appeals for the Eighth Circuit holding unconstitutional Minnesota's law banning fusion candidacies—that is,

candidates nominated to the same office in the same election by more than one party.[1]

Because New York permits fusion candidacies,[2] each of the Conservative and Liberal Parties has frequently nominated a standard bearer who is also the nominee of another party, typically the Democratic Party or the Republican Party. Fusion has enabled the Conservative and Liberal Parties to compete effectively since their founding in numerous races under New York's election laws; if those laws were changed to ban fusion, the Conservative and Liberal Parties could not do so. Thus, both the Conservative and Liberal Parties and voters, including members of the Conservative and Liberal Parties, have interests that may be adversely affected by a fusion ban.

First, a fusion ban would deprive the Conservative and Liberal Parties of their right to select a standard bearer who best represents the party's ideologies and preferences. Not only do the major parties enjoy this right, but a fusion ban would penalize the Conservative and Liberal Parties disproportionately in that they would likely be the parties that lose their chosen standard bearer. A fusion ban thus imposes on the minor party, and not the major party, a Hobson's choice—to have no standard bearer identified on the ballot at

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[1] All parties have consented to the filing of this brief. Letters of consent have been submitted to the Clerk.

[2] Pursuant to N.Y. Elec. Law §§ 6-120, 6-146(1) (McKinney 1978 & Supp. 1996), fusion candidacies are permitted provided that the candidate and the party of which the candidate is not a member consent. New York's election laws use the terms "political parties" and "independent bodies", each of which can get a line on the ballot after meeting certain statutory requirements. *See, e.g.*, N.Y. Elec. Law §§ 6-104, 6-142 (McKinney 1978 & Supp. 1996). For ease of reference, we use the term "minor parties" when discussing the New York experience and use it in the colloquial sense—namely, to refer to a party other than the Democratic and Republican parties, the "major parties".

the general election or to pick a standard bearer who *second* best represents its ideologies and preferences. Moreover, a fusion ban such as Minnesota's would deprive minor parties and voters of the identification on the ballot of the fusion candidate as the minor party's standard bearer. Minnesota would suppress the direct identification of the candidate with the minor party and thus deprive voters of truthful information that promotes the informed exercise of the franchise.

Second, a fusion ban would deprive the Conservative and Liberal Parties and voters, including members of the Conservative and Liberal Parties, of their right to an effective franchise. Voters under New York's statutory scheme can cast ballots for a fusion candidate on the lines of any party that nominated the candidate, so that voters through their choice of line can identify which portion of the candidate's platform they wish to support. A fusion ban would thus deprive the Conservative and Liberal Parties of the ability to appeal to voters to make use of an important vehicle for expressing their political views And without fusion New York voters would be forced either to "waste" their votes on a candidate unlikely to succeed or to offer undifferentiated support to a major party candidate.

SUMMARY OF ARGUMENT

New York's actual experience since fusion was re-legalized in the mid-1930s shows that fusion promotes core associational rights of political parties and voters. *See* Point I.A., *infra*. Fusion has contributed to New York's competitive political system by conferring significant benefits on candidates, parties—both minor and major—and voters and, indeed, fusion has made the difference in many electoral outcomes. As Minnesota concedes (Appellate Brief ("App. Br.") at 4), fusion is a significant electoral factor in New York.

New York's experience with fusion shows why Minnesota's fusion ban is unconstitutional. *See* Point I.B., *infra*. *First*, a fusion ban improperly restricts the rights of each party to choose the standard bearer who best represents its ideologies and preferences. Moreover, Minnesota goes beyond interference with the party's autonomy; it discriminatorily prevents a minor party from identifying its candidate on the ballot, thereby depriving voters of truthful information that is useful in the ballot box. *See* Point I.B.1, *infra*. *Second*, a fusion ban is not a reasonable and nondiscriminatory burden. Minnesota's fusion ban suppresses accurate information about a candidate's party affiliation; it denies the minor party, and not the major party, its choice of standard bearer; and it deprives the minor party, and not the major party, of its place on the ballot. Contrary to Minnesota's argument, New York's practice of providing a separate line to each party's candidate if the party meets the ballot requirements does not constitute preferential treatment of minor parties. If a state is going to provide separate lines for parties that meet the ballot requirements, there is no good reason to deny such a line—and many good reasons not to deny such a line—to a party *if and only if there is a fusion candidate*. *See* Point I.B.2 *infra*. *Third*, a fusion ban improperly undermines the effectiveness of the franchise. It

takes away a tool for minor parties, especially new parties such as the New Party, to build coalitions, and voters to express their preferences. In New York, voters can vote for a fusion candidate on the line of any of the nominating parties that have met New York's ballot requirements, so that voters can—and do—vote for a fusion candidate on the line that most accurately reflects their views. This results in a more accurate measurement of minor-party support and an increase in electoral competition and choices available to voters. *See* Point I.B.3, *infra*.

New York's actual experience since the mid-1930s also refutes Minnesota's speculations about the effects that fusion will have on the alleged state interests it asserts to justify infringing core rights of political parties and voters. *See* Point II, *infra*. *First*, fusion has not caused voter confusion. Not only is there no evidence of voter confusion in 60 years in New York, but voters benefit from the choices provided by fusion. *See* Point II.A, *infra*. *Second*, contrary to Minnesota's argument that a fusion ban promotes competition by "reserving limited ballot space for opposing candidates", fusion has actually increased competition because fusion forces candidates to announce and refine their positions on issues that are important to voters. *See* Point II.B, *infra*. *Third*, contrary to Minnesota's speculation about party raiding, fusion has not led to party raiding in New York because consent is required. *See* Point II.C *infra*. *Fourth*, even if the state had an interest in maintaining the distinct identity of the two major parties (*i.e.*, preventing party splintering), the experience of New York has been that the use of fusion has not undermined the two major parties. *See* Point II.D, *infra*.

ARGUMENT

I. A FUSION BAN BURDENS CORE ASSOCIATIONAL RIGHTS OF POLITICAL PARTIES AND VOTERS.

A. Fusion Has Promoted Core Associational Rights of Political Parties and Voters in New York.

The Liberal Party was founded in 1944, and the Conservative Party in 1962. Since its founding, each party has been an active participant in election races in New York at the local, statewide and national levels. For example, each party has nominated candidates in each presidential election, each U.S. senatorial election, each gubernatorial election, each New York City mayoral election and numerous other races.

Like the major parties and the New Party (Joint Appendix ("J.A.") at 6), each of the Conservative and Liberal Parties seeks to promote candidates that best represent its ideologies and preferences, to use the electoral process to advance its program and to widen its support in the general electorate. In furtherance of these goals, each of the Conservative and Liberal Parties has nominated candidates running exclusively on either the Conservative or Liberal line. For example, in 1969, John Lindsay was elected Mayor of New York City on the Liberal line and, in 1970, James Buckley was elected to the U.S. Senate on the Conservative line. And, more frequently, each party has nominated as its candidate for office a person who has also been nominated by another party.[3] In 1990, for example, the Conservative Party nominated a candidate who was also the nominee of another party in 99 of the 116 races in which it participated, and the Liberal Party nominated a candidate who was also the

[3] There have often been Liberal-Democratic or Conservative-Republican fusion candidates, and, less frequently, Liberal-Republican or Conservative-Democratic fusion candidates.

The Conservative and Liberal Parties' active role in New York elections depends on their ability to nominate fusion candidates under New York's ballot access laws.[4] Under New York law, any political organization that polls at least 50,000 votes in the last preceding election for its candidate for governor is considered a political "party", entitled to a line on the ballot. N.Y. Elec. Law §§1-104(3), 7-102-06 (McKinney 1978 & Supp. 1996). Because each of the Conservative and Liberal Parties meets this ballot requirement, which applies to all political parties, the Conservative and Liberal Parties, like the Democratic and

[4] After the institution of the secret (*i.e.*, "Australian") ballot in 1890, states began to regulate both ballot access and the form of the new official ballot in order to prevent competitive challenges to the major parties. *See* Steven J. Rosenstone et al., *Third Parties in America* 19-20 (1984). There have been several attempts in New York to outlaw fusion and thus prevent competitive challenges, but each time such legislation was passed, New York courts have struck down the statutes and "re-legalized" fusion. Daniel A. Mazmanian, *Third Parties in Presidential Elections* 125 (1974). The first attempt to outlaw fusion came in 1896, but this law was struck down in 1910 as "an unreasonable and arbitrary limitation on the right to nominate qualified people for office". Note, *The Constitutionality of Anti-Fusion and Party-Raiding Statutes*, 47 Colum. L. Rev. 1207, 1211 (1947) (citing *In re Callahan*, 93 N.E. 262 (N.Y. 1910)). The second attempt occurred in 1911, when Tammany Hall Democrats in New York passed a law which banned multiple ballot placement. *See id.* at 1211 (citing *Hopper v. Britt*, 96 N.E. 371 (N.Y. 1911)). The New York Court of Appeals struck down this law as unconstitutional, reasoning that because the law made straight-ticket voting more difficult for voters supporting fusion candidates, the law was discriminatory. *Hopper*, 96 N.E. at 374. The final attempt to outlaw fusion came in 1930, when the legislature tried again to stop fusion by prohibiting multiple ballot placement in certain circumstances. *See* Note, *The Constitutionality of Anti-Fusion and Party Raiding Statutes*, *supra*, at 1211-12. This too was struck down. *Id.* (citing *Matter of Crane v. Voorhis*, 178 N.E. 169 (N.Y. 1931)).

Republican Parties, are entitled to a line on the ballot identifying each candidate they have nominated.[5] The result of permitting fusion in New York is therefore that a fusion candidate of two "parties" is listed on more than one party line.[6]

The "essential attribute" of this fusion system "is the options it provides to both individual voters and political parties". Mazmanian, *supra*, at 134. This scholarly description is borne out by the facts.

Just as major party labels on the ballot benefit the electoral process because they are informative,[7] fusion

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[5] New York's practice of separate lines for each of the political parties supporting a fusion candidate has been called "disaggregation" by some commentators. *See, e.g.*, Note, *Fusion Candidacies, Disaggregation, and Freedom of Association*, 109 Harv. L. Rev. 1302, 1309 (1996). Although this brief sometimes uses that term, a note of caution is in order. The Conservative and Liberal Parties do not now argue that they have a constitutional right that votes for a fusion candidate on their lines be counted separately from the votes for the fusion candidate on the major party line; New York's election laws already provide for such separate counting. This issue might arise, however, in New York if either of the major parties eliminated all reference to political parties from the ballot, which we think is unlikely, or the ballot access requirements were revised in order to reduce the role of minor parties.

[6] This result does not depend on the presence of a Conservative or Liberal Party candidate on the ballot. In New York, there are contests where the same candidate is nominated by both the Democratic and Republican Parties; and the candidate is place on a separate line for each party. *See, e.g.*, *The Green Book 1984-1985, Official Directory of the City of New York* 4 (1985) (election of Ed Koch as Mayor of New York on both the Democratic and Republican tickets). For the Court's convenience we have lodged with the Court relevant sections of *The Official Directory of the City of New York* (now known as *The Green Book*) and *The New York Red Book*.

[7] As this Court has stated, "To the extent that party labels provide a shorthand designation of the views of party candidates on matters of

promotes the informed franchise because a fusion nomination gives a voter information about the candidate's views. For example, in New York, a coalition of the Republican Party and the Right to Life Party gives a voter specific insight about the candidate's views. *See Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 200 (8th Cir.), *cert. granted*, 116 S. Ct. 1846 (1996). Because a fusion candidate is nominated by more than one party, the candidate and parties must be very clear about which positions of which platforms are in common. This attention to issues assists voters who are increasingly casting their ballots according to a candidate's position on issues, and less according to "character" or party line. *See* Norman H. Nie, et al., *The Changing American Voter* 168-69 (1976).

Fusion increases competition in the marketplace of ideas by fostering political diversity.[8] Indeed, Minnesota quotes, without refutation, testimony that fusion "permit[s] electoral competition from both the left and the right of the mainstream parties, and greater representation of such minority views in

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public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220 (1986).

[8] Minnesota's contrary claim (App. Br. at 20) is unsupported by any citation. Moreover, it is inconsistent with other parts of its brief where Minnesota concedes that the ideas generated by minority parties increase political diversity (App. Br. at 9) and that political diversity is a good thing. (App. Br. at 45) New York's experience refutes Minnesota's further assertion that a fusion ban fosters political diversity by encouraging minor parties to run their "own" candidates. (App. Br. at 44-45) Minnesota wrongly assumes that the mere addition of an alternate name on the ballot translates automatically into increased diversity of political debate. In fact, New York's experience reveals that the opposite is often true. Without fusion, expression of minor party ideas is actually stifled because of the "wasted vote syndrome". *See* pp. 10-12, *infra*. Therefore, it is the practice of fusion, and not a ban, that fosters political diversity.

the selection of mainstream candidates". (App. Br. at 5) Moreover, "the ability of the third parties to survive over time makes them vehicles for new issues and programs that would otherwise have to await acceptance by a much broader audience before the major parties would address them." Mazmanian, *supra*, at 135.

Consequently, fusion generates a diversity of ideas, and provides voters in the election booth with a ballot containing "a greater variety of choices among party platforms and candidates than does a two-party contest." Mazmanian, *supra*, at 134. Indeed, by choosing to vote for a fusion candidate on a particular party line, New York voters can register their preferences of candidate, party, *and* policy platform in an election—because they can vote on either party line and thus have a choice of indicating support for the policy platform of one party rather than the other. Thus, if the voter prefers the policy platform of the minor party, she can cast her vote for the candidate on that party line; by voting for a candidate on the Conservative or Liberal line rather than on the line of one of the major parties, a voter states that it is the conservative or liberal position of the candidate's platform that she supports. Similarly, a voter can vote for a fusion candidate without necessarily supporting the major party. For example, a Democrat who does not like her own party's nominee but does not want to vote for a candidate on the Republican line can vote for a Republican-Liberal candidate for Mayor of New York City on the Liberal Party line rather than on the Republican Party line. (*See* p. 13, *infra*.) Fusion thus promotes voters' associational rights, and fusion, coupled with "disaggregation", promotes those rights with special force.

By providing these choices to voters, fusion alleviates "the wasted vote syndrome"; New York's "system does not force voters to choose between 'throwing their vote away' or voting for one of two major parties". Mazmanian, *supra*, at 135; *see*

also Affidavit of Walter Dean Burnham. (J.A. at 15)[9] As political scientists have recognized, because minor party candidates standing alone are usually perceived to have relatively little chance of winning a major election, many voters are hesitant to vote for a minor party candidate because of the self-fulfilling prophecy that a minor party candidate has little chance of winning. *See e.g.*, Mazmanian, *supra*, at 134-35. This fear of "wasting" a vote has become an even more significant problem because the number of voters that consider themselves independent has risen,[10] even though the two major parties are still dominant at the polls. Thus, the number of independent-minded voters who may prefer not to vote at all rather than demonstrate support for a major party or risk wasting their vote is increasing. *See, e.g., Disgruntleds Have It*, Economist, Nov. 5, 1994, at 23, 23.

Voters obviously benefit from fusion because they can vote their actual preferences without wasting their votes.

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[9] Minnesota did not submit any evidence to refute Professor Burnham's declaration; instead, it argues to this Court that Professor Burnham's assertion is a "dubious generalization". (App. Br. at 26) Our experience, together with the scholarly views described in the text of this brief, refutes Minnesota's rhetorical flourish.

[10] In New York, for example, there has been a growth in independent voters. Between 1970 and 1990, the percentage of voters registered as "Independent" in New York more than doubled; independent voters accounted for 22% of the electorate by 1996. *See* New York State Board of Elections, *Voter Enrollment as of April 1, 1996*, Compiled by Marcia Watson (1996). Party loyalty has declined. *See also* Nie et al., *supra*, at 166 (stating that "the American public has entered the electoral arena since 1964 with quite a different mental set than was the case in the late 1950's and early 1960's. They have become more concerned with issues and less tied to their parties."); *see also* Kevin V. Mulcahy and Richard S. Katz, *America Votes: What You Should Know About Elections Today* 84 (1976) (observing that the metamorphosis of the American voter from a party- to an issue-oriented voter centered around the introduction and debates over civil rights, Vietnam, and poverty).

Moreover, minor parties benefit because, without fusion, there is an undervaluation of minor party support (and an overvaluation of major party support), which detracts from the prestige of the party, makes it harder for the party to attract votes, to recruit new members, and to attract viable candidates.[11] Contrary to Minnesota's assertion that lifting a fusion ban would take a minor party's associational rights a "step further" (App. Br. at 14), it is the ban itself that prevents a minor party from fully measuring its support. And, because those effects are ongoing, the minor party support can never be accurately measured without fusion.

Because fusion allows for accurate measurement of minor party support, it provides new parties a powerful means of quickly making an impact on the electoral scene. For example, in 1944, Franklin D. Roosevelt agreed to be the Liberal Party's first nominee, which helped the Liberal Party to gain immediate acceptance. Without fusion, the Liberal Party would not have been able to establish itself at all. Moreover, the size of the vote for Roosevelt on the separate Liberal Party line allowed voters to send a message about the appeal of the Liberal Party and provided Roosevelt's margin of victory. Thus, fusion "allows third parties to retain their specialized constituencies while contributing to election

[11] For example, those with the experience and public stature necessary to be viable candidates could hesitate to run solely on the ticket of a minor party which, by definition, has fewer resources to support its candidate than a major party. This problem is exacerbated as the geographic scope and cost of the campaign increase. This problem is critical in New York, for example, since a party must win 50,000 votes in each gubernatorial election to maintain its status as a party and its line on the ballot. N.Y. Elec. Law §§1-104(3), 7-104(5) (McKinney 1978 & Supp. 1996). Meeting this mark would require a new or minor party to commit resources to the gubernatorial election that might be better spent in other local and state races—races in which a minor party has a greater likelihood of success.

outcomes through coalitions with the major parties". Mazmanian, *supra*, at 135.

Fusion can also benefit the major parties by making more likely the election of a candidate that both parties support. For example, in New York City, where registered Democrats outnumber registered Republicans by 5-1 (*see* New York State Board of Elections, *supra* note 10), Republican candidates have often succeeded by forming alliances with minor parties. This strategy has worked from the mid-1930s, when Fiorello LaGuardia used it, to the mid-1990s, when Rudolph Giuliani used it. *See* note 13, *infra*.

As a result, fusion balloting is a "significant electoral factor" in New York, as Minnesota concedes. (App. Br. at 4) Indeed, votes on the minor party lines, including the Conservative or Liberal line, have often provided the margin of victory for a candidate also nominated by one of the major parties.[12] For example:

- In New York City elections, there have been fusion candidacies since the 1930s, and the margin of victory has often been smaller than the total votes received on the minor party line. For example, Fiorello LaGuardia was elected Mayor of New York in 1937 and 1941 because he was the nominee of the Republican Party and various minor parties; John Lindsay became Mayor of New York in 1965 because he was nominated by both the Liberal and Republican Parties; and Rudolph Giuliani in 1993

[12] While it has been argued that, if not for fusion, some of the minor party voters may have supported the same candidate on the major party line, the minor party's endorsement may have affected enough voters' decisions to support that candidate to have made the difference. *See* Mazmanian, *supra*, at 121.

won the Mayor's office by a narrow margin because of votes on the Liberal Party line.[13]

- At the statewide level, the minor party vote in 1938 resulted in the election of Herbert Lehman as governor, even though Thomas Dewey's Republican total was greater than Lehman's Democratic total; the minor party vote in 1944 resulted in the election of Robert Wagner as United States senator; the Liberal Party vote in 1949 and in 1950 resulted in Herbert Lehman's election as United States senator; the Liberal Party vote was critical to the election of W. Averill Harriman as governor in 1954; Alfonse D'Amato won a Senate seat in 1980 and 1992 because of the votes he received on the Conservative Party line; and, George Pataki won the 1994 gubernatorial race because of votes on the Conservative Party line.[14]

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[13] In 1937, LaGuardia obtained 674,611 votes on the Republican line out of his total of 1,344,630 votes, while his opponent obtained 877,215 votes on the Democratic line (*The City of New York Official Directory 1940* 40 (1940)); in 1941, LaGuardia obtained 668,455 votes on the Republican line out of his total of 1,186,301 votes, while his opponent obtained 1,054,175 votes on the Democratic line (*The City of New York Official Directory 1942* 40 (1942)); in 1965, Lindsay got 867,310 votes on the Republican line and 281,796 votes on the Liberal line, as opposed to his Democratic opponent's 1,046,699 votes (*The City of New York Official Directory 1968* 29 (1968)); and in 1993 Giuliani got 867,767 votes on the Republican line and 62,469 on the Liberal line, as opposed to his Democratic opponent's 876,896 votes (*The Green Book 1994-1995: Official Directory of the City of New York* 4 (1995)).

[14] In 1938, Lehman received 1,971,307 votes on the Democratic line and 419,979 on the American Labor line, to Dewey's vote of 2,302,505 on the Republican line and 24,387 on the Independent Progressive line (*The New York Red Book 1940* 453 (M.C. Hutchins ed. 1940)); in 1944, Wagner received 2,485,735 votes on the Democratic line out of his total of 3,294,576, to his Republican opponent's 2,899,497 votes (*The New York Red Book 1945* 548 (J.S. Mearns ed. 1945)); in 1949, Lehman received 2,155,763 votes on the Democratic line and 426,675 votes on the Liberal line, as opposed to John Foster Dulles' 2,384,381 votes on the Republican line (*The New York Red Book 1950* 712 (J.S. Mearns ed. 1950)); in 1950, Lehman received 2,319,719 votes on the Democratic line and 312,594, on the Liberal line, as opposed to his Republican opponent's 2,367,353 votes (*The New York Red Book 1951* 734 (J.S. Mearns ed. 1951)); in 1954, Harriman received 2,296,645 votes on the Democratic line and 264,093 on the Liberal line, as opposed to his Republican opponent's 2,549,613 votes (*The New York Red Book 1955* 785 (M.D. Hartman ed. 1955)); in 1980, D'Amato received 2,272,082 votes on the Republican line, 275,100 votes on the Conservative line and 152,470 votes on the Right to Life line, as opposed to his Democratic opponent's 2,168,661 votes (*The New York Red Book 1981-1982* 1092 (G.A. Mitchell ed. 1982)); in 1992, D'Amato received 2,652,822 votes on the Republican line, 289,258 votes on the Conservative line and 224,914 votes on the Right to Life line, as opposed to his opponents' 2,943,001 votes on the Democratic line and 143,199 on the Liberal line (*The New York Red Book 1993-1994* 1044 (G.A. Mitchell ed. 1994)); and in 1994, Pataki received 2,156,057 votes on the Republican line and 328,605 votes on the Conservative line, as opposed to Mario Cuomo's 2,272,903 votes on the Democratic line and 92,001 votes on the Liberal line (*The New York Red Book 1995-1996* 868 (G.A. Mitchell ed. 1996)).

- New York's minor parties' influence in national elections is likewise compelling. Franklin D. Roosevelt carried New York in 1940 because of the American Labor line and he won New York in 1944 because of the Liberal Party line; votes on the Liberal Party line provided the margin of victory for John F. Kennedy in 1960; and votes on the Conservative Party line provided the margin of victory for Ronald Reagan over Jimmy Carter in 1980.[15]

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[15] In 1940, Roosevelt received 2,834,500 votes on the Democratic line and 417,418 on the American Labor line, as opposed to Wendell Willkie's 3,027,478 on the Republican line (*The New York Red Book 1941* 560 (1941)); in 1944 Roosevelt received 2,478,598 on the Democratic line, 496,405 on the American Labor line and 329,235 on the Liberal line, as opposed to Dewey's 2,987,647 on the Republican line (*The New York Red Book 1945* 546 (J.S. Mearns ed. 1945)); in 1960, Kennedy received 3,423,909 votes on the Democratic line and 406,176 votes on the Liberal line, as opposed to Richard Nixon's 3,446,419 votes on the Republican line (*The New York Red Book 1961-1962* 828 (M.D. Hartman ed. 1962));

B. A Fusion Ban Burdens Associational Rights of Political Parties and Voters.

1. A Fusion Ban Deprives a Party of Its Right to Select a Standard Bearer Who Best Represents Its Ideologies and Preferences.

A political party has a constitutional right to select "a standard bearer who best represents the party's ideologies and preferences". *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224 (1989); *see also id.* at 229-30. As described above (*see* pp. 6-7, *supra*), the Conservative and Liberal Parties have exercised this right either by nominating candidates on their own lines or, more frequently, by nominating fusion candidates.

Minnesota does not seriously dispute that a political party has a right to nominate its own standard bearer.[16] Instead, Minnesota argues that a minor party can exercise the right to "select" the candidate of another party, but that Minnesota can prohibit the identification of that candidate on the ballot "as the candidate of both parties" (App. Br. at 23); it argues that "[t]he New Party remains free to "*choose* . . . and to *endorse*" the standard bearer of its choice, but that "if the New Party *selects* someone who is already the candidate of another party, the candidate *cannot appear* on the general election ballot as

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in 1980, Reagan received 2,637,700 votes on the Republican line and 256,131 on the Conservative line, as opposed to Carter's 2,728,372 votes on the Democratic line (*The New York Red Book 1981-1982* 1086 (G.A. Mitchell ed. 1982)).

[16] It is unclear whether Minnesota has abandoned the argument that it made in the courts below that there is only a *de minimis* burden on the minor party if it cannot nominate the few candidates nominated by the major parties. (*See e.g.*, App. Br. at 36) Such a restriction is clearly an improper invasion of the minor party's autonomy prohibited by this Court's decision in *Eu*.

the candidate of both parties". (App. Br. at 23; emphasis added) Minnesota is wrong.

Party labels are informative to voters. (*See* pp. 8-9, *supra*) Minnesota's discrimination against minor parties cuts at a vital communication between the party and the voters.[17] The fusion ban will thus improperly have a substantial adverse effect on the minor party's electoral success. *See Riddell v. National Democratic Party*, 508 F.2d 770, 775 (5th Cir. 1975). Moreover, Minnesota would permit the major parties, but not the minor parties, to communicate by means of these labels; it would have the minor party, and not the major party, have an invisible standard bearer.[18] Minor parties that qualify to be on the ballot should have a right to communicate their choice of standard bearer on the ballot on the same terms as the major parties. *See Tashjian*, 479 U.S. at 214.

2. A Fusion Ban Is Not a Reasonable and Nondiscriminatory Restriction.

Minor parties have a right to compete for votes under electoral rules that do not impinge on them disproportionately. *Norman v. Reed*, 502 U.S. 279, 288-89 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 793-94 (1983); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). A fusion ban disproportionately burdens minor parties; it is not a reasonable, nondiscriminatory burden of the type that this Court has upheld.

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[17] We discuss below Minnesota's overexpansive reading of *Burdick v. Takushi*, 504 U.S. 428 (1992). (App. Br. 32-33) *See* p. 19, *infra*.

[18] Since Minnesota is not arguing that it is entitled to omit all party labels, we do not address the question whether a party could force the state, over its decision not to permit any party labels, to include party labels on the ballot.

First, Minnesota's ban is not reasonable in that it suppresses truthful information that is useful to voters. *See* Point I.B.1, *supra*.

Second, a fusion ban is discriminatory in several ways. A fusion ban, like Minnesota's, which prohibits cross-nomination, deprives the *minor party* of the ability to select the standard bearer of its choice if that standard bearer has already been nominated by a major party. The minor party rather than the major party will lose the candidate. Moreover, Minnesota's idea of a silent standard bearer—nominated but not identified on the ballot—likewise discriminates against minor parties because the major parties can use the party labels prohibited to the minor parties. Similarly, a fusion ban discriminates against minor parties by denying a separate ballot line even though they qualify for such a line. Contrary to Minnesota's repeated argument (App. Br. at 10), fusion candidacies do *not* "require[ ] the government affirmatively to enhance opportunities for exercise of First Amendment rights".[19] Once it has obtained the necessary support to get on the ballot, a minor party has the right afforded to all parties—the right to nominate its chosen standard bearer and to have a line on the ballot to communicate that nomination to voters.

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[19] Minnesota argues erroneously throughout its brief that this "case tests the extent to which states must frame their election laws, and their election ballots in particular, to maximize opportunities for minor political parties" (App. Br. at 8) and that the New Party "wants the State to reconfigure its ballot" by giving it "*another* ballot position for [the fusion] candidate so that it can demonstrate through the ballot the support it provided for that candidate". (App. Br. at 10) This case is not about "extending rights" or "reconfig[uring]" or "revising" or "altering the ballot" in order to "maximize [political] opportunities" for minor parties (App. Br. at 8, 10, 26, 31-35) or about single-issue advertising on the ballot (App. Br. at 10, 35); it is about unreasonable discrimination against minor parties.

3. A Fusion Ban Violates the Right to an Effective Franchise.

Fusion in New York has increased the effectiveness of the franchise—among other things, it has permitted political parties like the Conservative and Liberal Parties to compete in a way that would be impossible without fusion; it has increased competition in the marketplace of ideas and has increased options to voters; and it has been the deciding factor in many important races. *See* Section I.A, *supra*. Fusion has thus advanced the interest of "like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences". *See Norman*, 502 U.S. at 288.

We do not attempt here to define the precise contours of political parties' and voters' associational rights to an effective franchise. Rather, we respond to Minnesota's repeated argument that permitting fusion candidates on the ballot is equivalent to a protest vote for Donald Duck. (*See* App. Br. at 10, 32-33) It is not.

A vote for a Conservative or Liberal Party fusion candidate cannot be compared to registering a "protest vote" or "a means of giving vent to 'short-range political goals, pique or personal quarrel'". *Burdick*, 504 U.S. at 438 (citation omitted). This Court did not hold in *Burdick* that the vote for candidates on the ballot has no "expressive" function. Election results do send a message; that is one of their functions. Fusion, unlike a protest vote for Donald Duck, serves to enhance the ability to speak and hear that message; it improves the effectiveness of the franchise. *See* Section I.A, *supra*.

II. MINNESOTA DOES NOT OFFER A SIGNIFICANT, MUCH LESS A COMPELLING, STATE INTEREST IN BANNING FUSION.

A. Fusion Has Not Confused Voters.

Minnesota claims that a "fusion ban reduces voter confusion by keeping the ballot simple". (App. Br. at 41) Minnesota is wrong.

Minnesota underestimates the capabilities of the electorate; this Court's cases reflect a "greater faith in the ability of individual voters to inform themselves about campaign issues." *Anderson*, 460 U.S. at 797. Minnesota's alleged efforts to prevent voter confusion should be viewed with additional skepticism because Minnesota is reducing the information available to voters. *Id.* at 798. This is especially so because, as described above (*see* pp. 17-18, *supra*), Minnesota actually suppresses truthful and useful information about the fact that a minor party has nominated a fusion candidate.

In any event, New York's experience with fusion refutes Minnesota's speculation. New York's ballot is complex because voters must make decisions about numerous issues and candidates at each election. A fusion ban will not make these decisions "simple", especially if Minnesota is correct in its argument that a fusion ban will result in more candidates on the ballot. (App. Br. at 44)[20]

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[20] Minnesota argues that both fusion *and* a fusion ban would produce a lengthy ballot full of candidates; it asserts both that "[f]usion invites the development of large and more complex ballots" (App. Br. at 42) and that a fusion ban "encourages minor parties to present candidates for election who may have been overlooked by the major parties". (App. Br. at 44)

In fact, fusion is informative, not confusing. (*See* pp. 8-10, *supra*)[21] Contrary to Minnesota's reference to an ambiguous comment in a nearly forty-year-old article about elections over fifty years ago (App. Br. 43),[22] there is not a shred of evidence suggesting that fusion has confused New York voters. Indeed, New York election returns reveal a pattern of sophisticated, not confused, voting behavior. Where fusion candidates appear on the ballot, voters in New York do not consistently cast their votes along a single party line. For example, in 1970, the Liberal and Republican parties both nominated Charles Goodell for U.S. Senate and Nelson Rockefeller for Governor. The voters split their tickets; Rockefeller won, but Goodell lost.[23]

In the absence of any facts to demonstrate voter confusion in New York, Minnesota argues that candidates may promote fusion candidacies for a variety of mischievous motives,

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[21] There is no reason to think voters would be any less sophisticated in Minnesota. Political scientists have recognized that, since being confronted with "wedge issues" of the late 1960s and early 1970s, voters have evaluated candidates with increasing sophistication. *See, e.g.*, Theodore Lowi, *The Party Crasher*, N.Y. Times Magazine, August 23, 1992, at 28, 28, 33.

[22] Minnesota cites (App. Br. at 43) a comment in a 1957 law review article about the election of Fiorello LaGuardia that LaGuardia's multiple parties presented a "somewhat confusing picture". No voter was confused about the party lines of the Little Flower, who was more famous than several of the parties who nominated him. Indeed, in the next mayoral election, LaGuardia's successor on the ticket of the three parties lost by a three-to-one margin. *The City of New York Official Directory 1948* 42 (1948) (Jonah Goldstein, running on three parties' tickets, lost 3 to 1 to William O'Dwyer).

[23] Goodell received 1,178,679 Republican votes, while the Conservative Party candidate, James E. Buckley, received 2,179,640 votes. *The New York Red Book 1971-1972* 1028 (M.D. Hartman ed. 1972). In the Governor's race, Rockefeller received 3,105,220 Republican votes. *Id.* at 1023.

including a desire to win voter attention and associate with popular party slogans, thereby increasing dramatically the number of candidate names on the ballot. (App. Br. at 42-43) However, the experience of Liberal and Conservative Parties in New York demonstrates that Minnesota's wholly speculative concerns are simply unfounded: such "laundry list" ballots have not happened in New York. Nor do those concerns justify a fusion ban; general ballot access requirements adequately limit the number of candidates and parties eligible to be placed on the ballot. *See* N.Y. Elec. § 1-104(3) (McKinney 1978 & Supp. 1996).

B. Fusion Has Promoted Electoral Competition Between Opposing Candidates.

Minnesota argues that fusion suppresses candidate competition by using up "limited space on the general election ballot" because, Minnesota speculates, each candidate is cross-nominated by many parties, thereby giving the appearance that all candidates represent similar positions. (App. Br. at 44-45) Minnesota is wrong.[24]

The experience in New York is quite the opposite.[25] Fusion increases competition in the marketplace of ideas; it forces candidates to refine their positions on key election issues, thereby shedding light on the issues on which opposing candidates differ. *See* p. 9, *supra*. This refinement

[24] As noted above, the state's interest in limiting the number of candidates appearing on a ballot, or preventing the ballot from becoming a "laundry list" of candidates, is already served by separate ballot access provisions. *See* p. 7, *supra*. New York has not used up the allegedly "limited space" of the ballot. And, given this concern with limited ballot space, it is also illogical that Minnesota suggests that minor parties should nominate their "own" candidates (instead of forming a coalition). (*See* App. Br. at 44-45)

[25] Political scientists rank New York as a very competitive electoral state. *See, e.g.*, Mulcahy and Katz, *supra* note 10, at 57.

draws candidates out of the center where their positions tend to merge together, thereby enhancing the competition between them. Moreover, because voter participation has typically been higher in contested races, it is often in those close contests that the votes received on the minor party line make the difference in the outcome. Thus, the Eighth Circuit below recognized that, rather than frustrate competition, fusion may actually "invigorate" competition. *Twin Cities Area New Party*, 73 F.3d at 199.[26]

C. Fusion Has Not Promoted Party Raiding.

Minnesota asserts that fusion leads to party "raiding." (App. Br. at 45)[27] Again, Minnesota's fears are belied by New York's experience.

Because fusion cannot occur in New York without the consent of the party of which the candidate is not a member (*see* note 2, *supra*), party raiding by multiple nomination is impossible. Minnesota's reliance on *Zuckman v. Donahue*, 79 N.Y.S.2d 169 (N.Y. Sup. Ct.), *aff'd*, 80 N.E.2d 698 (3d Dep't 1948) (App. Br. at 45), is misplaced. *Zuckman* concerned a group of voters who set out to "seize control" of the American Labor Party precisely because the group was unsympathetic to the party's platform. *Id.* at 701. The court held that "[e]nrollment and attempted seizure of party

[26] This conclusion is supported by data that demonstrate that a voter whose preference for a candidate is driven by the candidate's position on issues—a preference facilitated by fusion—is more likely to vote than is a voter whose preference is driven by the candidate's party affiliation. Nie et al., *supra*, at 169-70.

[27] Minnesota also claims that a minor party's nomination of a major party candidate "simply to gain the status of a major party" is somehow impermissible. (App. Br. at 45) Minnesota offers no support for this position. That is not surprising since Minnesota is in effect arguing that the voters should not be permitted to vote on whether they wish the minor party to gain such status on the ballot.

machinery for the purpose of advancing the fortunes of another political party will not be tolerated." *Id.* at 700. What *Zuckman* prohibits, therefore, is a one-sided coup attempt born out of unsympathetic motives.[28] Fusion presents an entirely different situation; fusion is consensual, and it benefits both parties. *See* Mazmanian, *supra*, at 118-19.

D. Fusion Has Not Splintered the Major Parties.

Minnesota claims that fusion causes party splintering. (App. Br. at 46-50)[29] Minnesota is wrong.

Decades of actual experience with fusion in New York show that fusion has not compromised the distinct identities of the various parties. The Liberal Party has been in existence since 1944, the Conservative Party since 1962. Throughout the existence of both parties, fusion has been permitted, and

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[28] The "not in sympathy" language in *Zuckman* reflects the spirit of New York's anti-raiding law, passed one year before in Chapter 432 of Election Laws of 1947. *Cornett v. Sheldon*, 894 F. Supp. 715 (S.D.N.Y. 1995). That law, known as the "Wilson-Pakula" law, is now codified as N.Y. Elec. Law §6-120(3) (McKinney 1978 & Supp. 1996) (requiring consent of a party's executive committee to nominate as a candidate one who is not a member of that party). Significantly, as was stated in *Werbel v. Gernstein*, 78 N.Y.S.2d 440 (N.Y. Sup. Ct.), *aff'd*, 78 N.Y.S.2d 926 (2d Dep't 1948), the purpose of the anti-raiding law is to prevent membership in a party *by those not in sympathy* with the party. The consent requirement thus ensures that fusion candidates are in sympathy with the party whose nomination they seek. In fact, in *Clark v. Rose*, 379 F. Supp. 73 (S.D.N.Y. 1974), *aff'd*, 531 F.2d 56 (2d Cir. 1976), the constitutionality of the consent requirement of the Wilson-Pakula law was upheld. The court reasoned that "New York, by enacting the statute, therefore, has reasonably sought to allow fusion tickets where desired without subjecting its political parties and their members to the debilitating effects of voter confusion and usurpation of the party organizations." *Id.* at 78.

[29] Minnesota claims that party splintering may occur if one party's various factions each nominate the same major-party candidate under different "ballot slogans" on the general election ballot. (App. Br. at 47)

both parties have engaged in fusion on a regular basis. Nonetheless, neither party has lost its distinct identity. *See* Mazmanian, *supra*, at 132. Nor have the Republican or Democratic Party lost *their* distinct identity in the face of competition from the minor parties. For example, it is difficult to assert credibly that the Republican Party was irrevocably splintered into issue-based factions because Rudolph Giuliani was also nominated by the Liberal Party, or that it was splintered when Alfonse D'Amato was also nominated by the Conservative Party. In fact, because fusion forces candidates and parties to refine their positions on issues, fusion actually *enhances* the distinctness of the major parties.[30]

CONCLUSION

Fusion is a critical aspect of core associational rights of both political parties and voters. Moreover, Minnesota has not demonstrated any state interest sufficiently weighty, or sufficiently limited to its alleged interest, to justify the burden on those rights. *Amici* therefore respectfully urge this Court

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[30] Fusion does not affect the possibility of party splintering in any way. "The state interest in avoiding the danger of candidate-based factionalism is furthered by disaffiliation requirements, but is irrelevant to fusion bans." Note, *Fusion Candidacies, Disaggregation, and Freedom of Association*, *supra* note 5, at 1326. Indeed, party splintering has not occurred in New York even though New York election laws do not require consent of the "home" party, *i.e.* the party of which the candidate is a member (which is virtually always the major party).

to affirm the Eighth Circuit's ruling that Minnesota may not constitutionally ban fusion.

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Respectfully submitted,

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